No. 82-1788

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

ALABAMA POWER COMPANY,

Petitioner,

v.

NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE MUNICIPAL ELECTRIC UTILITY ASSOCIATION OF ALABAMA IN OPPOSITION TO THE PETITIONER

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BRIEF OF THE MUNICIPAL ELECTRIC UTILITY ASSOCIATION OF ALABAMA IN OPPOSITION TO THE PETITIONER

This brief in opposition is submitted by the Municipal Electric Utility Association of Alabama (MEUA), an unincorporated association of twelve Alabama municipalities and public utility boards which own and operate facilities for the sale and distribution at retail of

electricity. Two of the members of MEUA own small amounts of low voltage transmission line. In the past these transmission facilities were used to make wholesale sales to customers in Baldwin County, Alabama. Those customers are now served by Alabama Power Company (APCo.). MEUA opposes the petition for certiorari on the following grounds: (1) no important federal issue is presented and (2) the decision below was correct.

STATEMENT OF THE CASE

This petition seeks to have the Court review a decision of the Court of Appeals for the Eleventh Circuit which affirmed an 81 page decision of the Atomic Safety and Licensing Appeal Board of the Nuclear Regulatory Commission (ALAB) in proceedings to determine whether grant of an unconditioned license for the Farley nuclear units would create or maintain a situation inconsistent with the antitrust laws. The ALAB decision itself modified a 153 page decision of the Commission's licensing board. The record below included more than 26,900 pages of testimony and several hundred exhibits, many of which were themselves hundreds of pages. The prefiled testimony of one witness, not a part of the transcript but a part of the record, exceeded 500 pages. The complex factual record remains hotly contested.

The licensing board decision followed hearings which for phase I (liability) extended from December 4, 1974 with recesses to April 9, 1976. Following close of the record in phase I, the parties submitted briefs totalling more than 1000 pages. The licensing board found that APCo. had monopoly power in the relevant wholesale market and had engaged in a number of anticompetitive acts.

The licensing board held APCO's contract with the Southeast Power Administration (SEPA) to be "anti-

competitive in nature and effect."[1] SEPA is the federal marketing agent for surplus low cost power generated at Corp of Engineers projects. SEPA has no transmission facilities of its own but must depend upon the transmission lines of APCo to market preference power to MEUA members and other preference customers in central and southern Alabama. In June 1970, APCo and SEPA entered into a contract providing that APCo would firm and wheel SEPA preference power but only to those preference customers who purchase all of their remaining power needs from APCo.[2] The licensing board held that the SEPA agreement deterred MEUA members from seeking alternative wholesale power and aided APCo in maintaining its dominance in the wholesale market.[3] The offending provision of the SEPA contract remained in effect until 1976.

The licensing board also found that APCo's contracts to sell wholesale power contained provisions precluding MEUA members from using power from any other source without the consent of APCo. Such provisions operated to discourage MEUA members from installing their own generation and transmission or acquiring other sources of supply and were anticompetitive.[4]

The licensing board found that APCo had acted in concert with others to preclude small electric utilities in central and southern Alabama from obtaining the benefits of coordinated operations and development.[5] In addition, the licensing board found that APCo had refused to engage in coordinated operation and development with Alabama Electric Cooperative (AEC) from 1968-1972[6] and that APCo's conduct in competing for

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[1]5 NRC 937.

[2]SEPA was able to provide only approximately 20% of each MEUA member's total power requirements.

[3]5 NRC 937.

[4]5 NRC 932.

[5]5 NRC 946-57.

[6]5 NRC 916-25.

service to the United States Army at Fort Rucker was inconsistent with antitrust laws.[7] All parties took exception to the decision of the licensing board. ALAB in its decision found that the retail market and coordinating services markets were also relevant and dominated by APCo. Significantly ALAB said that, "It would be permissable for us to find any number of additional alleged instances of misconduct to have been part of an anticompetitive pattern and thus subject to obloquy,"[8] and "it might be possible to build on this to find a great many more instances of anticompetitive conduct fit into the same pattern."[9]

ALAB made specific additional findings of anti-competitive concern in two areas: (1) the refusal of APCo to permit AEC to purchase an ownership interest in the Farley units, and (2) APCo's use of low wholesale rates to forestall the construction of competing generating facilities by AEC.

APCO's claim to this Court that none of its anti-competitive acts except its failure to share ownership of the Farley plant with AEC occurred after early 1972[10] is simply untrue. ALAB pointed out, what APCo knows full well, that "the applicant's anticompetitive behavior extended until 1976, when it finally agreed to remove Section 4.2 from its contract with SEPA."[11] There is no evidence in the record showing that APCo has ceased acting in concert with others to preclude small electric utilities in central and southern Alabama from obtaining the benefits of coordinated operations and development. Although license conditions have been in effect for nearly 24 months requiring APCo to sell ownership in the Farley units, APCo is still sole owner of those units.

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[7] 5 NRC 942-45.
[8] 13 NRC 1076.
[9] 13 NRC 1080.
[10] APCo. Petition for a Writ of Certiorari, p. 3.
[11] 13 NRC 1107.

ARGUMENT

I.

NO IMPORTANT FEDERAL ISSUE IS PRESENTED.

The principal issue raised by these proceedings concerns the judicial construction of the statutory language "create and maintain a situation inconsistent with the antitrust laws." That language is the test applied under the Atomic Energy Act of 1954 for the purpose of determining whether a license for a nuclear power plant should issue. Although this language has been in the Act since 1970, this is the first occasion on which its meaning has been discussed by a court. According to the Edison Electric Institute there will be only a few occasions in the future when courts will have the need to consider the language.[12]

It is also instructive to consider the seven other federal statutes cited by APCo[13] which contain similar language. This language has been a part of the Federal Property and Administrative Services Act[14] for more than thirty years, and the Outer Continental Shelf Lands Act[15] for nearly thirty years, and The Naval Petroleum Reserves Production Act[16] for twenty-six years. Despite the presence of the language "create or maintain a situation inconsistent with the antitrust statutes" in seven different statutes for periods as long as thirty years, the simple truth is that the meaning of that language is so clear as to have not required judicial construction prior to this case.[17] Moreover, as EEI has

[12]EEI brief, p. 4.

[13]note 12 brief p. 9.

[14]40 U.S.C. § 488.

[15]43 U.S.C. § 1337.

[16]10 U.S.C. § 7430.

[17]Congress placed the language in four of the statutes after ALAB construed and applied the language in its decision in *Consumers Power Co.* (Midland Units 1 and 2) 2 NRC 29 (1975).

pointed out, questions concerning the language are unlikely to arise again. Ascertaining the meaning of the "create and maintain" language has not proved to be difficult. The guidance of this Court is not required.

APCo and EEI would have this Court believe that the nation's nuclear power option is at stake if the decision below is allowed to stand. In light of the troubles besetting the industry ranging from existing overcapacity, enormous cost over runs, declining fossil fuel costs and the incident at Three Mile Island, it is unlikely that the instant decision looms large as a factor in the nuclear power equation. Moreover, the electric utility industry has been aware since the early 1970's that applicants for nuclear licenses would be subject to far-reaching antitrust review and potentially far-reaching license conditions including all of those imposed in this case.[18] The possibility of antitrust review did not dissuade utilities from proceeding with plans for nuclear power plants. Most of the major electric utilities have already submitted to the process and have either been found free of antitrust problems or have agreed to license conditions eliminating those concerns.

The license condition to which APCo most strenuously objects is the requirement that it share ownership with AEC. Joint ownership of nuclear units is not uncommon. Of 71 nuclear units operating in December, 1981, 21 were jointly owned.[19] Of the nuclear units then under construction, 53 of 87 were to be jointly owned. Utilities have increasingly recognized that joint ownership is advantageous to all participants in the unit.[20] The Alabama Public Service Commission has

[18]For example, a list of potential license conditions were set forth in Construction Permit No. CPPR-85, August 16, 1972 for the Farley units. Despite this warning in the construction permit, APCo was able to raise the hundreds of millions of dollars required for construction of the units.

[19]Affidavit of Argil Toalston attached hereto as Appendix A at para. 10.

[20]Toalston, para. 10

itself urged APCo to sell off 25% of the Farley units.[21] In fact, the electric utility industry has proceeded on the assumption that the Commission's view of its statutory powers is correct. Most of the utilities with license conditions requiring joint ownership submitted to such conditions without contest. For more than a decade the industry has structured itself in anticipation of a decision such as that made by the Eleventh Circuit. Any other result would throw a new variable into the nuclear power equation.

II.

THE ELEVENTH CIRCUIT'S DECISION WAS CORRECT

APCo argues that the lower court erred in its review of the ALAB decision because the Court said that antitrust laws "do not apply in the usual way to nuclear power regulation." Furthermore, APCo contends ALAB failed to consider the impact of regulation on the company's activities. MEUA disagrees on both counts.

In holding that the antitrust laws do not apply to NRC proceedings in the usual fashion, the court below was stating the obvious. In the first place, the Commission is required to include in its consideration the provisions of the Federal Trade Commission Act "which normally are not identified as antitrust law."[22] The unfair methods of competition condemned by § 5(a) of the Federal Trade Commission Act reach beyond the activities proscribed by the Sherman Act.[23]

Moreover, the Commission is required to consider not only the antitrust laws and the Federal Trade Com-

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[21] 5 NRC 878 quoting Opinion of the Alabama Public Service Commission in Docket No. 17094, July 12, 1976 at pp. 5-6.

[22] H.R. Rep. No. 91-1470, reprinted in U.S. Code Cong. Serv. 4995 (1970).

[23] FTC v Motion Picture Advertising Serv. Co., Inc., 344 U.S. 392, 394 (1953).

mission Act but also the policies underlying those laws.[24] Further, it was the intent of Congress that the Commission base its findings on a probability not a certainty of contravention of the antitrust laws. Add to this the fact that the statute is prophylactic in nature to "nip in the bud" incipient anticompetitive problems and the basic foundation of the Atomic Energy Act of free competition and it is not surprising that the court below held that the antitrust laws are not to be applied in the traditional way. With this understanding, the court quite properly affirmed.

A fair reading of the decision of the court below makes it clear that NRC has not been set free to impose its own notions of what creates or maintains a situation inconsistent with the antitrust laws. Rather, what the court properly did was to recognize that the statutory scheme requires something different from a rigid application of the Sherman Act. Antitrust principles and analysis do apply but not as they would in a traditional court setting. Thus, the court pointed out, "Congress did not intend that the NRC limit its concerns to activities which are mature violations of the antitrust laws."[25]

The contention that ALAB failed to consider the effect of regulation is equally lacking in merit. The extent of regulation affecting APCo was developed over several days of testimony and was keenly contested. Both the Licensing Board[26] and ALAB considered the role of regulation in defining monopoly power and market structure. In addition to affirming most of the licensing board's findings, ALAB specifically addressed the role of Alabama statutes in restricting and shaping competition at retail[27] as well as the effect of federal regulation on wholesale competition.[28] ALAB also considered the

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[24]692 F. 2d 1368.
[25]692 F. 2d 1368.
[26]5 NRC 884, 861-7, 878.
[27]13 NRC 1061-2, 1073-4 and fns. 96, 98, 99, 100, 111, 112.
[28]13 NRC 1061-2, 1073-4 and fn. 122.

prospective efect of the Public Utility Regulatory Policies Act.[29] APCo's real argument is not that the Court misapplied the law but that the Commission did not agree with the company on the facts.

CONCLUSION

This case presents no legal issue of importance beyond the confines of this case. Indeed, as is recognized by *amicus* EEI the principal issue is unlikely to be faced again. The court below properly applied the law. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[29] 13 NRC 1042 fn. 38.

CERTIFICATE OF SERVICE

I hereby acknowledge that I have served three copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit and its accompanying appendix by first class mail postage prepaid on the following counsel to the parties of record, this ~~1st~~ 29th day of ~~June~~ May 1983.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ALABAMA POWER COMPANY,	)	
Petitioner,	)	
	)	No. 81-7547
v.	)	81-7580
	)	81-7846
NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA,	)	81-7847
	)	81-7848
Respondents.	)	

AFFIDAVIT OF ARGIL L. TOALSTON

Argil L. Toalston deposes and says:

1. I am an employee of the United States Nuclear Regulatory Commission ("Commission" or "NRC"). My position is Section Leader, Antitrust Section, Antitrust and Economic Analysis Branch, Division of Engineering, Office of Nuclear Reactor Regulation. I have been closely connected with the Nuclear Regulatory Commission's antitrust program since October, 1972. This affidavit is based upon my personal knowledge or information from NRC records reviewed by me as part of my responsibilities. The statements made in this affidavit are true to the best of my knowledge and belief.

2. NRC's major statutory obligations regarding nuclear materials and facilities include (1) protecting the public health and safety, (2) safeguarding materials and facilities from sabotage or diversion, (3) protecting the environment, and (4) preventing the creation or

maintenance of a situation inconsistent with federal antitrust laws. Of these complementary aspects of licensing I have supervisory responsibility for the NRC staff's program to avoid inconsistency with the antitrust laws. In pursuit of my responsibilities I have contributed to the development of NRC's regulatory program and requirements and to the antitrust analysis and licensing process for numerous individual nuclear facilities. The antitrust review of Alabama Power Company's (APCo) Joseph M. Farley facility is one for which I have responsibility.

3. The Commission's antitrust role is consistent with the policy of the United States as declared by Congress in the Atomic Energy Act of 1954: "[T]he development, use and control of atomic energy shall be directed so as to . . . strengthen free competition in private enterprise." 42 U.S.C. 2011. Congress's intent was made more explicit by the adoption in 1970 of antitrust amendments to Section 105 of the Atomic Energy Act. 42 U.S.C. 2135. These amendments among other things established a procedural mechanism for pre-licensing antitrust review in connection with the licensing of commercial nuclear power reactors. The role of antitrust review in the licensing scheme is to assure that the operation of a nuclear facility does not, in the words of the statute, "create or maintain a situation inconsistent with the antitrust laws."

4. The license conditions at issue in this lawsuit (license conditions) result from a lengthy proceeding initiated in connection with APCO's license to construct the Farley facility.[1] That proceeding was conducted in

[1]Nuclear reactor licensing is a two-tiered process requiring licensing at both the construction and operating stages. Construction stage formal antitrust review is, with exceptions not here relevant, obligatory; whereas, at the operating stage such review occurs only in the event the Commission determines that significant changes have occurred since the previous review. Antitrust conditions may be imposed on operations of licensees as a result of proceedings at the construction or operating stages or both.

accordance with statutory requirements as well as NRC's rules for adjudicatory hearings. *See* 10 CFR Part 2 Subpart G. APCO and the NRC staff were parties to the proceeding which also included the Department of Justice and two intervenors — Alabama Electric Cooperative, Inc. (AEC) and Municipal Electric Utility Association of Alabama (MEUA). The evidentiary phase of the proceeding was presided over by a three member NRC Atomic Safety and Licensing Board; the appellate phase was before the NRC Atomic Safety and Licensing Appeal Board. The Commission itself also considered the matter sufficiently to determine whether to exercise its review power, and declined to do so.

5. APCO has been on notice of the effectiveness of these conditions since the June 30, 1981 order of the Appeal Board. Alabama Power's license was formally amended on August 10, 1981 to incorporate these conditions. See 46 *Fed. Reg.* 42227 (August 19, 1981).

6. The main thrust of the license conditions is to require that APCO avoid or terminate a situation inconsistent with the antitrust laws by providing certain bulk power supply and coordination services to AEC and any municipally owned distribution system in Alabama (the municipals), which includes members of MEUA. In a nutshell, (1) APCO is to enable AEC to secure bulk power from the Farley facility by means of a sale of participation in ownership of the plant, and to enjoy the benefits of that bulk power through APCO's provision of transmission services and reserve sharing, and (2) APCO must "wheel" power for the municipals. APCO is to be fully compensated for the required sale and provision of the required services which it need only provide to the extent its facilities are adequate.

7. More specifically, the license conditions provide as follows:

Antitrust license condition no. 2 requires Alabama Power Company to offer to sell a small percentage of the Farley plant to Alabama Electric Cooperative. Based on the relative 1976 peak loads of Alabama Electric Cooperative and Alabama Power Company as shown in the 1977-1978 Electric World Directory of Electric Utilities, this would be about four (4) percent[2] of the facility, which is less than 1% of APCO's total generating capacity. Alabama Power Company is entitled to full costs for this portion of the facility while being protected from interference by Alabama Electric Cooperative in the day-to-day operation of the plant.

Antitrust license conditions nos. 3 and 7 require Alabama Power Company to provide transmission services for Alabama Electric Cooperative and for municipally-owned electric utility systems, respectively. Alabama Electric Company will be properly compensated for such services including transmission losses. Such transmission service by the dominant electric utility in an area is not uncommon within the industry and eliminates the need for costly duplicative transmission facilities and the associated undesirable environmental impacts of duplicative facilities.

Antitrust license conditions nos. 4, 5 and 6 require Alabama Power Company to provide power supply and coordination services such as reserve sharing, partial requirement wholesale power, and other power supply services as are reasonably available. These other power supply services could include emergency power and voltage support, unit power sales, wholesale power sales, diversity power exchanges, joint planning activities, and other transmission services not specifically covered by conditions 3 and 7.

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[2]The total amount, based on official records, may be somewhat larger due to the off-system members of AEC.

Antitrust license condition no. 8 provides a forum before the Federal Energy Regulatory Commission or the Alabama Public Utility Commission for working out the detailed conditions and charges implementing the power supply and coordination services required by the other conditions. This ensures that APCO will receive proper compensation for the services it provides and protection from any unreasonable demands that may affect reliability of its system.

8. Antitrust license conditions similar to those imposed by the Commission on APCO's licenses are found in numerous nuclear power plant licenses. Some of these conditions have been determined by NRC adjudicatory boards, others have been negotiated by the licensees with the Department of Justice, NRC staff, intervenors or potential intervenors, or a combination of these parties. In the following six paragraphs I will discuss briefly some general attributes of such license conditions.

9. The power supply and coordination services specified in the antitrust license conditions are of the type that are freely engaged in within the industry by many electric utility companies. They provide benefits to each of the participating parties through the joint use of power supply sources and other facilities, thus reducing duplicative facilities and permitting greater economies of scale.

10. A requirement to sell a participation share leads to joint ownership. Joint ownership of nuclear plants is not uncommon within the industry. Of 71 nuclear units now operating, 50 are singly owned; whereas, 21 are jointly owned. While at least one of these joint ownership arrangements, Hatch Unit No. 2, was required by antitrust license conditions, most were voluntary. Of the nuclear generating units under construction but not yet operating, 53 of 87 units are to be jointly owned. Of those 53 units, antitrust license conditions or commitments by

the applicants to the Department of Justice require the applicants to offer ownership interest in 24 of the nuclear units to other electric utilities in the area. Because nuclear power plants are highly capital intensive, joint ownership provides advantages in permitting economy of scale while diversifying capital requirements and economic risk.

11. Due to reduced electrical load growth in recent years and increased financial difficulties shared ownership of nuclear generating units has become increasingly advantageous. Licensees of at least three generating units that are already operating are currently selling off a part interest in these units to others — Virginia Electric Power Co. is selling a 25% interest in North Anna Unit No. 2 to Old Dominion Electric Cooperative and Carolina Power and Light Co. has applied for a license amendment to permit North Caroline Municipal Power Agency No. 3 to own 18.7% of Brunswick generating units Nos. 1 and 2. Consistent with the general trend of reduced load growth, the Southern Subregion of Southeastern Electric Reliability Council, which includes APCO and its affiliates, Georgia Power Co., Gulf Power Co. and Mississippi Power Co., reported in its 1981 annual report to the Department of Energy:

> Reserves as now anticipated are above the target level throughout the 10-year period. Long-term capacity and energy sales to neighboring systems have been made and negotiations for additional sales are now in progress with good prospects that some of these will be consummated. This could bring retained system reserve margins to a more desirable level.

The foregoing, coupled with the fact that APCO's system average cost is currently less than the cost of the power from the Farley plant (APCO's Brief, Affidavit of Joseph M. Farley at 31), suggests to me that it would be

advantageous for Alabama Power Company to sell some of its excess capacity, and such a sale would be considered favorably by the Alabama Public Service Commission[3] and by the financial markets.

12. Typically, participation agreements among joint owners of a nuclear power plant permit the lead licensee to have full control over the operation of the plant while sharing the output power and associated costs of the plant among the owners. For example, Georgia Power Company sold approximately half of its Hatch Nuclear Units 1 and 2 and its Vogtle Nuclear Units 1 and 2 to nearby municipals and cooperatives, while maintaining control over the construction and operation of these units. In an unusual case, Duke Power is in the process of selling the entire Catawba Unit 2 Nuclear Unit to other utilities while still maintaining control over the construction and operation of the unit.

13. Participation agreements also include provisions for liability protection and property insurance. Prior to Three Mile Island the maximum property insurance available was limited to $300 million on a facility. Although the maximum available has raised to $450 million, the insurance companies are actively considering further raising the amount available to approximately $1 billion. Moreover, the NRC is preparing rulemaking that would require licensees to obtain the maximum available property insurance. Thus, sufficient insurance should be available to cover cleanup costs in the event of an accident and the participation agreement could require AEC to cover its *pro rata* share of the insurance premium.

14. The license condition requiring APCO to sell an ownership share of its Farley units provides for APCO to receive in payment the full cost for the capacity sold. My analysis of the outcome of this sale is that it would

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[3]Opinion of the Alabama Public Service Commission, Docket No. 17094 at 5-6 (July 12, 1976).

provide APCO a source of funds and relieve its need to borrow in the financial markets. There would be no economic loss to Alabama Power Company, although it is true that APCO would no longer have the opportunity to earn a profit on the excess capacity. The overall economic advantage of the sale would depend on the alternative sale arrangements that Alabama Power Company might be able to consummate absent the nuclear plant sale. Considering the reported excess of capacity in the subregion,[4] it is reasonable to conclude that alternative prospects are not favorable.

I declare under penalty of perjury that on knowledge and belief the foregoing is true and correct. Executed on this 21st day of December, 1981.

/s/ Argil L. Toalston

ARGIL L. TOALSTON
Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission

Subscribed and sworn this 21st
day of December 1981.

/s/ Patricia A. Sullivan
Notary Public

My Commission Expires October 14, 1983

[4]A November 15, 1981 report by the North American Electric Reliability Council of the "1981/82 Winter Assessment of Overall Reliability and Adequacy of Bulk Power Supply in the Electric Utility Systems of North America" shows the Southern Subregion's February 1982 reserve margin to be 44%.